

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-758

December 2, 1998

PUBLIC UTILITIES COMMISSION
Investigation into Use of Central
Office Codes (NXXs) by New England
Fiber Communications LLC d/b/a
Brooks Fiber Communications

ORDER REVISING PROPOSED
FACTS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION

On October 6, 1998, we commenced this proceeding with a Notice of Investigation (NOI). Part III of the NOI proposed certain factual findings; Part IV contained a proposed set of "Factual and Legal Conclusions," and Part V described certain possible proposed orders. The NOI itself designated Brooks, New England Telephone & Telegraph Company d/b/a Bell Atlantic and the other ILECs as parties. It requested those parties and persons filing notices of intervention (proposed intervenors) to state whether they objected to any of the proposed factual findings stated in Part III of the NOI. If a party or proposed intervenor objected to particular proposed findings, the NOI required the party or proposed intervenor to file an offer of proof that would describe the evidence that party would produce to contest the proposed finding. The NOI noted that the proposed findings were based on information obtained during our prior Inquiry into this matter, *Public Utilities Commission, Inquiry Regarding Local Calling from Independent Telephone Company's Exchanges to New CLEC NXX Codes*, Docket No. 98-661.

II. NEED FOR AN EVIDENTIARY HEARING NOT ESTABLISHED

Brooks (New England Fiber Communications LLC d/b/a Brooks Fiber), the Public Advocate and Great Works Internet (GWI)¹ objected to the procedure for addressing the Part III findings, arguing that, by law (35-A M.R.S.A. §§ 1303-06), the Commission is required to hold a hearing, and that the proposed procedure has deprived them of a hearing. We disagree. The objecting parties have been afforded an opportunity to establish that an evidentiary hearing is necessary to contest the Part III facts, but have not done so.

¹GWI is a proposed intervenor whose petition has been granted by separate procedural order.

The NOI allowed parties and proposed intervenors to object to the Part III.A proposed factual findings and to file offers of proof in order "to convince the Commission that it should hold a hearing on the factual questions." See NOI, Part III.B. Part III.B also stated that "if a hearing is held, other parties would have a right to present opposing evidence and to conduct cross-examination." In short, the NOI indicated that an evidentiary hearing would be held on the Part III.A proposed factual findings if necessary, i.e., if a party legitimately contested one or more of the proposed facts. There is no practical reason and it is wasteful of resources to hold an evidentiary hearing if there are no contested facts. We also do not believe that the law requires an evidentiary hearing if facts are not in dispute.

We will hold a "public hearing" in this case at which parties may present argument and their views. Title 35-A M.R.S.A. §§ 1303-1306 might be construed to require a public hearing, but we do not decide that issue because we will hold one in any case. We decide, however, that we are not required to hold an "evidentiary hearing" in this case because there are no facts in dispute. Nothing in sections 1303, 1304, 1305 or 1306 explicitly requires a hearing or, in particular, an evidentiary hearing in a Commission investigation.

Section 1303, in connection with the Commission's decision to commence an investigation, states:

If after the summary investigation, the commission is satisfied that sufficient grounds exist to warrant a formal public hearing as to the matters investigated, it shall give the interested public utility written notice of the matter under investigation.

Section 1303 then states that the Commission, after the required notice, "may set a time and place for a public hearing" (emphasis added). The final sentence of section 1303 states: "the hearing shall be held in accordance with section 1304."

Section 1306 clearly *assumes* that a "public hearing" will have taken place:

If after a public hearing the commission finds that a term, condition, practice, act or service complained of is unjust, unreasonable, insufficient, unjustly

discriminatory or otherwise in violation of
this Title . . .

35-A M.R.S.A. § 1306(2).

Sections 1304 and 1305 both address procedural rights and other requirements concerning "public hearings." Their reference to such matters as subpoenas, witnesses and evidence anticipates that "public hearings" might be evidentiary in nature. Again, however, none of the provisions expressly requires a "public hearing," or, in particular, an evidentiary hearing when there are no facts in dispute.

The Maine Administrative Procedure Act (APA) also does not expressly require an evidentiary hearing in an adjudicatory proceeding; rather, it defers to the "applicable statute or constitutional law." See 5 M.R.S.A. §§ 9051(1), 9052(1) and 9052(2).

If a hearing is required by the applicable statute or by constitutional law, 5 M.R.S.A. § 9056(2) provides that each party shall have the right to present evidence and argument, to call witnesses and to conduct cross-examination. Those rights may be limited by the agency to "prevent repetition or unreasonable delay." In addition, 5 M.R.S.A. § 9053 allows an agency to "place on any party the responsibility of requesting a hearing if the agency notifies him in writing to a hearing of his right, and of his responsibility to request the hearing . . ."

We construe these provisions as intending to provide evidentiary hearing rights equal to but not greater than those afforded by principles of constitutional due process. Due process may require an administrative agency to provide an evidentiary hearing if an adjudicatory fact is in issue, but not otherwise. We also construe these provisions as being consistent with the common-sense principle that the law does not require unnecessary procedures and actions. For the reasons described below, no party has established that there is a factual issue in NOI, Part III that must be litigated.

The right to be "heard" encompasses both the right to present argument on law and policy as well as the right to present evidence. See 5 M.R.S.A. § 9056(2). As described in part V below, we will hold a "public hearing" in this case and will allow parties to present argument in addition to the argument they may present in briefs. We have already afforded an *opportunity* in the NOI that would allow parties to present evidence addressing disputed facts, but no party has convinced us that such a presentation is necessary.

Brooks made a number of objections, intermixed with argument, to some of the facts proposed in Part III. GWI made essentially one objection to the proposed factual findings. Bell Atlantic made one comment about one statement in the proposed facts. No other party or proposed party objected to any of the proposed facts in Part III of the NOI.

We have the choice of holding an evidentiary hearing on the contested facts or accepting the objections, in which case an evidentiary hearing is not necessary. We accept most of the changes proposed by Brooks and GWI. We do not view any of those proposed changes as material, i.e., they would not, at least at this time, cause us to change any of the tentative factual and legal conclusions we proposed in NOI, Part IV or to modify any of the possible orders in NOI, Part V.

In addition to the changes based on Brooks's and GWI's objections, we make a second set of changes that eliminates certain findings because we believe they are more properly characterized as "factual or legal conclusions" that should be included in NOI, Part IV and that should be addressed in the procedure we will use for Part IV.

We reject one of Brooks's objections on the ground that Brooks has misunderstood or mischaracterized the finding in question and did not actually object to the proposed fact in question.

Aside from the specific facts that we address in Part III below, we decide that the remainder of the objections to the proposed findings of fact raised by Brooks and GWI are not directed to the proposed facts themselves, but constitute argument as to why the Commission should or should not enter a particular decision. We therefore do not address those objections in the fact finding process in Part III below.

III. REVISED PROPOSED FINDINGS (NOI PART III)

We set forth here the paragraphs from the NOI, Part III that we change pursuant to the objections raised by Brooks and GWI. We restate those paragraphs in "legislative format," which shows the changes. Attached to this Order as Appendix A is a complete set of the findings (NOI, Part III, as modified by this Order.) Following each revised paragraph, we will state our reasons for the changes.

A. Paragraph 2

2. Brooks owns and maintains a switch in the City of Portland. Bell Atlantic and Brooks own and maintain trunking between Brooks's switch and BA's ~~toll~~ tandem switch in Portland, *which switches both local and interexchange traffic.*

We strike the word "toll" because we agree with Brooks's objection that the BA's Portland tandem switches both local and toll traffic.

B. Paragraph 4

4. Brooks has applied for and has obtained 55 CO codes (NXXs) from the North American Numbering Plan Administrator (NANPA). *Presently At the time it obtained the codes* the NANPA ~~is~~ *was* Bell Atlantic; Lockheed Martin ~~will take~~ *took* over this function in late October *of 1998*. The 55 codes are assigned to various geographic locations throughout the State. Only 3 of the CO codes are assigned to locations within the Brooks Portland area exchange. Those three codes are Portland 228, South Portland 239 and Westbrook 464.

C. Paragraph 6

6. Brooks does not own, lease or maintain any facilities (switches, ~~or loops, interoffice facilities, etc.~~) in any of the locations at which the 52 non-Portland area CO codes are assigned.² A potential subscriber located in one of ~~those~~ *the non-Portland CO code* locations is not able to obtain ~~local exchange service~~ *(a loop, local switching, or local dial tone)* from Brooks at that location. ~~If For~~ *For* Brooks ~~were~~ to offer ~~local exchange service~~ *loops, local switching and local dial tone* in one of the non-Portland CO code areas, *(for example, in Augusta), and it used* *using* its Portland switch for switching, Brooks would need to obtain a dedicated facility (a loop and an interoffice facility) from the customer's premises in Augusta to Brooks's switch in Portland. Alternatively, it could

²Brooks also does not purchase local service for resale purposes from BA so that it would be able to provide local service to any of those locations. If a CLEC did provide local service through resale, it would not acquire its own CO code.

place a switch in Augusta and build (or buy) a loop from that switch to the customer in Augusta.

We remove the conclusory statements from paragraph 6 that the service Brooks provides in its non-Portland exchanges is not local exchange service. Brooks argues that the service it is providing, which it characterizes as foreign exchange in nature, is either a form of local exchange service or satisfies any requirement that might exist for a carrier to provide a "local" service for the purpose of obtaining and using a CO code. This issue is one that is subject to legal argument, and we therefore have moved our tentative conclusion to the proposed Factual and Legal Conclusions (NOI, Part IV), where it will be addressed by briefing.

We strike the words "interoffice facilities" from the parenthetical in the first sentence. It does not accurately describe a facility that would be used "in" one of the non-Portland locations. Rather, such a facility would be used as described further below in this paragraph 6 as a portion of a loop from Brooks's Portland switch to one of the non-Portland locations. Brooks objected to the first sentence on the ground that it "has the use of trunk groups and fibers" that direct traffic from areas at which its non-Portland codes are assigned to its Portland switch. GWI made similar objections. Our deletion of the words "interoffice facilities," for the reason described above, moots the issue raised by Brooks and GWI for the first sentence of paragraph 6.³ We have made changes in paragraph 7, however, to reflect the fact that Brooks' traffic is normally (except for overflow) carried over a separate BA trunk group described in the Brooks-Bell Atlantic interconnection agreement as "Traffic Exchange Trunks."⁴ See further discussion below at paragraph 7.

Brooks denied that it had any obligation to "offer traditional outgoing local exchange service in [the non-Portland locations] in order to be entitled to apply for, use, and maintain its non-Portland CO codes for purposes of receiving incoming FX-like calls" Brooks then stated that "if there is any such obligation," it "disputes the implication in footnote 2 that resale of BA service, using BA NXX codes, would

³The facilities are owned by Bell Atlantic and are not "owned, leased or maintained" by Brooks, so that if we had not removed the phrase "interoffice facilities" for other reasons, the sentence would have been literally correct.

⁴Our review of GWI's response indicates that this is the only factual objection it made.

not fully satisfy such obligation or condition." The footnote states that Brooks could provide local service by reselling Bell Atlantic local exchange service, but, in fact, it is not doing so. We do not agree, however, that providing local service in this manner would serve as justification for using the non-Portland CO codes for its Portland area customers to receive the "FX-like calls." As the footnote states, a carrier would not need its own CO code to provide service through resale. Brooks itself admits that if it resold Bell Atlantic service, it would be "using BA NXX codes." Brooks will have to justify its use of the non-Portland CO codes for "FX-like" purposes on some other basis.

D. Paragraph 7

7. ~~Because~~ Brooks does not ~~deploy local facilities~~ *provide loops, local switching and local dial tone* in any of the non-Portland locations, *or purchase local exchange service for resale from another local exchange carrier, or provide any other method for a call to be terminated in those locations.* Therefore, a person placing a call to one of those codes cannot be connected to a Brooks customer that has a customer premises⁵ in the location to which the code is assigned. ~~, except under the circumstances described in paragraph 10 below. Normally,~~ *Instead, t*he call will be routed to (or terminate at) a Brooks customer that is located in the Brooks Portland area exchange, and that is connected by a loop or other transport facility provided by Brooks (or by the customer) to Brooks's Portland switch. Thus, if a ~~customer~~ *person* calls a number in Brooks's 835 code (assigned to Augusta), the ~~customer~~ *person* will be connected to a Brooks customer located in Brooks's Portland area exchange, and not to a Brooks customer located in Augusta.

If, for example, a BA customer in Augusta calls a number with an 835 CO code (the Brooks code that is assigned to Augusta), the call will be routed as follows:

- ♦ from the BA customer's premises in Augusta over the BA loop facilities assigned to that customer to the local BA Augusta switch;

⁵A customer premises is a place, normally a building, at which an access line may terminate.

- ♦ then over BA's trunking (transport) facilities ~~either dedicated to Brooks's traffic~~ directly to Brooks's switch in Portland ~~(for overflow traffic, according to Brooks's response)~~ or, in the case of overflow traffic, over BA non-dedicated trunking facilities to BA's tandem ~~(toll switch)~~ in Portland, and then over the trunks owned by Brooks that run from BA's tandem to Brooks's switch;
- ♦ then to a Brooks's customer~~s~~ having premises in the Brooks's Portland area exchange over a Brooks loop or other transport facility assigned to that customer.

We make the changes in the first sentence of paragraph 7 for consistency with the changes we have made to paragraph 6.

We strike the reference to paragraph 10 because we eliminate paragraph 10. See discussion at paragraph 10 below.

We make the changes in the second bullet because of statements in Brooks's October 18, 1998 "Answer and Objections" concerning normal and overflow routing of traffic that originates in Brooks's non-Portland CO code locations and that terminates at Brooks's customers in its Portland area exchange. See also discussion at paragraph 6 above. Brooks's statements contradict the text and chart contained in the response it filed on September 8, 1998 in the Docket No. 98-661 Inquiry, but confirm statements it made at the technical conference in the Inquiry held on September 1, 1998. The fact that the Brooks traffic is carried over a dedicated group of BA trunks, rather than by BA trunk groups used for general traffic, is not material to any of our other findings or to our proposed Factual and Legal Conclusions.

E. Paragraph 8

8. If, for example, a caller in Hampden (served by an independent telephone company (ITC)) places a call to an 849 number (the Brooks code assigned to Bangor), the call is routed over trunks owned and maintained by the ITC from Hampden to the meet point between the ITC and BA, then over BA trunks ~~either directly to the BA tandem in Portland and then to Brooks's switch in Portland, or directly~~ to Brooks's switch in Portland, (or, for overflow traffic, to the BA tandem in Portland, then to Brooks's switch), then to a Brooks~~'s~~

customer in its Portland area exchange. It is not necessary for the call to be routed to or through Bangor on the way to Portland, although Hampden Telephone Company's and BA-ME's trunking ~~might~~ *could* be configured to route it ~~that way, unswitched, through Bangor~~. The call will be switched at the Hampden switch of Hampden Telephone Company, but it will not be switched at BA-ME's Bangor switch.

We make the first set of changes for consistency with the changes we proposed to paragraph 7. We make the second set of changes to clarify the finding in light of statements made by Brooks.

F. Paragraph 9

9. Under both of the scenarios described in Paragraphs 7 and 8 above, the call cannot be routed from Brooks's switch to a Brooks customer either in Augusta or in Bangor; there are no ~~transport (tracking)~~ *or* loop facilities from Brooks's switch in Portland *or facilities that are configured in such a way as to act as loops* to carry the call ~~either to Augusta or Bangor~~ *or* to a Brooks customers *s* who *is* ~~are~~ located in Augusta or Bangor.

Brooks admits that it has no loop facilities outside the Portland area. It also "denies that it has no transport facilities outside the Portland calling area . . . but admits that such facilities are not used to carry calls from Brooks's switch to Brooks customers in, for example, Bangor or Augusta." Brooks's denial is based on the fact that separate Bell Atlantic trunking facilities are used to carry traffic from the non-Portland areas to Brooks's switch.⁶ See discussion in connection with paragraphs 6, 7 and 8 above. Because of Brooks's denial concerning "transport facilities," we strike the words "transport (tracking)" (which were intended to say "transport (trunking).") We make other changes, consistent with Brooks's second "admission" quoted above, to make clear that Brooks cannot presently terminate calls to any customers outside its Portland

⁶A data response from Bell Atlantic states that the separate trunks used for Brooks's traffic are one-way, carrying traffic to Brooks's switch. It also indicates that there also are some one-way trunks from Brooks's switch in Portland to various non-Portland locations throughout the state. A data response from Brooks states that these outbound trunks are not presently being used. In any event, it remains clear that Brooks does not provide loop facilities in those non-Portland locations.

exchange, because it does not have or offer loops in any of those areas. Brooks could only terminate calls in those areas if it provided local loops in those areas.

G. Original Paragraph 10 Eliminated

~~10. A customer calling one of the Brooks non-Portland CO codes may on some occasions be connected to a customer location located outside the Brooks Portland area exchange, but only if Brooks or the customer has made arrangements for facilities (e.g., private lines) or services to route the traffic from Brooks's switch in Portland to the non-Portland area location. In most of those instances the calls will be routed to a non-Portland area location that is different from the location at which the CO code used by the caller is located. (For example, if the original call was placed by a caller in Augusta to an 835 number assigned to an ISP located in Biddeford, the call would ultimately terminate in Biddeford, not Augusta.)~~

We remove all of paragraph 10 because Brooks states that presently no calls are routed from Brooks's Portland switch to locations outside the Portland area exchange.

NOTE: Original proposed ¶¶ 11 through 14 are renumbered as 10 through 13 because of the elimination of ¶ 10.

H. Paragraph 10 (former No. 11)

~~11.10. The Brooks Portland area exchange is not within the BSCAs of the ILECs, BSCAs (as established in their terms and conditions and pursuant to the BSCA rule, ch. 204) for those~~ *None of the incumbent local exchange carriers (ILEC) exchanges that are located in the places to which the 52 Brooks non-Portland CO codes have been assigned include the Brooks Portland area exchange within their basic service calling areas (BSCAs), as established in their terms and conditions pursuant to the BSCA rule, Ch. 204.*

Brooks correctly pointed out that the original version of this paragraph was difficult to understand.⁷

⁷Because Brooks was unable to understand the original version, it did not comment or object. No other party or proposed party filed any comment about the proposed paragraph. If Brooks wishes to object to the factual assertions in this paragraph, it may do so on or before December 9, 1998.

I. Paragraph 11 (former No. 12)

We make no changes to this paragraph. The end of this paragraph describes the "expectation" of customers in non-Portland areas that a call to a Brooks code, represented or listed as located in that area, would be billed as a local call. Brooks points out that customers would have the same expectation if they dialed a local ILEC number that provides foreign exchange (FX) service to an exchange outside the local calling area. The purpose of the paragraph is to describe representations and customer expectations concerning Brooks's non-Portland codes. Brooks will have ample opportunity in argument to characterize its service and to draw comparisons to other carriers' services. We see no need to amend the paragraph.

J. Paragraph 12 (former No. 13)

~~13.~~12. Bell Atlantic considers calls to the non-Portland CO codes to be calls to the locations specified by the Brooks assignments on file with the NANPA and rates them accordingly. Thus, Bell Atlantic rates a call to 835 (assigned to Augusta) as terminating in Augusta, even though it actually terminates at a Brooks customer who is located in the Brooks Portland Area exchange. ~~(or, under the circumstances described in paragraph 9, elsewhere).~~ If a Bell Atlantic customer in Augusta calls an 835 number, there is no toll charge; the call is considered local. Similarly, if a Bell Atlantic customer in Readfield (whose BSCA includes Augusta) calls an 835 number, Bell Atlantic considers the call to be local and no toll is charged. For purposes of the interconnection agreement with Brooks, Bell Atlantic also considers the call as terminating at the location assigned to the code by Brooks and the NANPA (e.g. 835 - Augusta). Thus, for a call from Augusta or Readfield to an 835 number, Bell Atlantic pays a "reciprocal compensation" to Brooks for "interconnection pursuant to section 251(c)(2)," as provided in the interconnection agreement approved by the Commission pursuant to 47 U.S.C. § 252 on August 26, 1997, in Docket No. 97-502, even though BA transports the traffic from Augusta to Portland over its ~~toll~~ interexchange toll trunking facilities. Under the agreement, BA-ME and Brooks pay each other "reciprocal compensation" of \$.008 per minute for "Local Traffic." "Local Traffic" is defined in the agreement as traffic in the local areas included in BA-ME's terms and conditions, Part A, § 6, i.e., the local exchange plus exchanges that are

included in that exchange's BSCA. The agreement also makes clear that the companies' respective access tariffs apply to all switched "Exchange Access" services⁸ and to intraLATA toll traffic (i.e., to interexchange traffic). The agreement defines "intraLATA traffic" as all traffic that is not local. That definition is substantively identical to the definition of "interexchange communications or traffic" contained in Chapter 280, § 2(G) of the Commission's rules.

We make two changes to this paragraph. In the second sentence we strike the parenthetical reference to paragraph 9 because we eliminated the referenced portion of paragraph 9. In the fifth sentence, we remove the adjectives "interexchange toll" that modified "trunking facilities." This change is consistent with those we made in paragraphs 6 and 7 to avoid the characterization of any existing facilities as "interexchange." That is a legal question we will address in the Factual and Legal Conclusions section (NOI, Part IV).

Brooks also argues that the Brooks-BA interconnection agreement *requires* Bell Atlantic to consider calls that originate in Brook's non-Portland locations to be local calls. That is an open issue that will be addressed in the Factual and Legal Conclusions.

Brooks also argues that the discussion in this paragraph concerning "exchange access" is "irrelevant," and "begs the question, which is, are the telephone services in question 'toll'?" We agree that whether the traffic that originates in non-Portland areas and terminates in Portland is interexchange ("toll") or local is one of the major issues in this case. One significant source for the answer may be provided by the Brooks-BA interconnection agreement, and the term "exchange access" is relevant to that agreement. The agreement defines local traffic, and applies interconnection charges to that traffic. It applies access charges to all non-local traffic, which includes "intraLATA traffic" and "exchange access." The latter term is defined by federal law, and is substantively

⁸The agreement defines "exchange access" as that term is used in the Telecommunications Act. 47 U.S.C. § 153(16) states:

(16) EXCHANGE ACCESS.-The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

identical to the term "interexchange access" that we use in Maine. One purpose of the description in paragraph 12 is to characterize the overall design of the Brooks-BA interconnection agreement's treatment of "local" and "non-local" traffic. We also note that in Part IV of the NOI (as modified by Part IV below), we tentatively conclude that the traffic that originates at Brooks's non-Portland codes locations and terminates in Portland is interexchange traffic. Accordingly, the question of whether that traffic is "interexchange," and whether Bell Atlantic is therefore providing "exchange access" to Brooks, is very much at issue in this case. For these reasons, we will not change the description of the interconnection agreement.

Brooks "denies" that there is anything in Chapter 280, § 2 (the definition of "interexchange traffic") that requires a "different" result from that under the interconnection agreement. Brooks has apparently misread the paragraph. It states that the Chapter 280 definition is "substantively identical" with the definitions in the interconnection agreement.

The remainder of Brooks's arguments should be presented in connection with the Factual and Legal Conclusions.

GWI states that it will present evidence "that pursuant to the interconnection agreement and understanding between Brooks Fibre [sic] and BA, the telephone companies knew of the local calling arrangement, . . . [which] contemplated one point of presence." GWI did not state why this evidence might be relevant, and we see no obvious relevance to the proffered testimony. Accordingly, we will not permit it.⁹

K. Paragraph 13 (former No. 14)

We make no change to paragraph 13. This paragraph describes actions of the independent telephone companies (ITCs) in reaction to the acquisition and use by Brooks of its non-Portland codes. Brooks is "without information sufficient to form a belief . . .," and wants to conduct discovery. Brooks is free to conduct any appropriate discovery under our rules. The activities of the ITCs have no bearing on our consideration of Brooks's activities, which are the central focus of this investigation. A description of the ITCs' actions is relevant, if at all, in the event we determine that the ITCs should make changes in their current practices concerning the Brooks traffic. (See, e.g., the possible orders in Part V of the NOI.) What the

⁹GWI states these proposed facts in conjunction with its claim that "the traffic" is carried over the "Brooks/BA dedicated toll network." We have proposed findings concerning these separate trunks in ¶ 7 above.

ITCs are presently doing may not even be relevant to our consideration of what they ought to do.

L. Paragraph 14 (former No. 15)

~~15.~~14. The NANPA has projected that Maine will need another area code by the second quarter of 2000 *and has requested this Commission to present a plan for a second area code by December 1, 1998.* Approximately 792 CO codes are available in an area code. Of the 792 CO codes in area code 207 ~~(including the 55 CO Brooks codes)~~, 518 *(including the 55 Brooks CO codes)* have been assigned. Within the 518 assigned codes (many to exchanges with a small number of customers), there ~~are~~ *is* a large number of unused telephone numbers. Those *unused* numbers are not presently available for use by another LEC, however, because the telephone numbers within a CO code (NXX) cannot presently be apportioned among LECs; each LEC providing local exchange service in an area currently must have its own CO code. A solution *(local number portability)* that allows ~~different~~ *several* LECs to ~~use~~ *share numbers in* the same CO code *in the same area is not* likely ~~will not~~ *to* be available for another one or two years.

We make two changes that clarify the purpose of this paragraph. Brooks claims it is "without information" to respond and needs to conduct discovery to determine when CO code exhaust may occur. Brooks apparently did not understand the point of the paragraph, which is that the NANPA has projected code exhaust, and has requested the Commission to provide a plan for a second area code. The accuracy of the NANPA's projection is not at issue in this paragraph. That accuracy may be relevant elsewhere in this case, e.g., in determining what action, if any, we might order Brooks to take.

Brooks argues "it is irrelevant that Brooks' use of its non-Portland CO codes obviously means that such codes are not now available for assignment to others" Brook's view of this case could not be more mistaken. The use, or misuse, of CO codes, and the consequences of such use or misuse, is obviously one of the major subjects of this case.

Concerning the "solution" described in the last sentence, Bell Atlantic commented that it "assumes" that solution is local number portability (LNP), but that LNP will not provide for geographic portability. We intended to state that with LNP more than one carrier in the same geographic area can share a single CO code, i.e., through the number pooling (in 1000-number,

or possibly even smaller, blocks) that Bell Atlantic described in its comment. We have amended the paragraph to provide more specificity.

**IV. CHANGES TO FACTUAL AND LEGAL CONCLUSIONS (NOI PART IV),
BASED ON PROPOSED CHANGES TO FINDINGS (NOI PART III)**

We make certain changes described below (in legislative format) to the *Proposed* Factual and Legal Conclusions that were set forth in Part IV of the Notice of Investigation. We are changing only *proposals*; we are not declaring any conclusions at this time. The changes are derived primarily from the changes we made (in Part III above) to the proposed factual findings contained in Part III of the NOI. We make some changes to the proposed factual and legal conclusions because of our review of some of the objections made to those original proposed factual findings. For example, we have eliminated from the factual findings the conclusion that Brooks's non-Portland codes were being used for interexchange service and the characterization of Brooks's service as being like foreign exchange service (FX). Those tentative conclusions are derived from underlying facts, and we have moved them to the Proposed Factual and Legal Conclusions (NOI Part IV).

We also make some changes to the characterization of rights and obligations under the interconnection agreement, in response to arguments and characterizations made by Brooks in connection with the NOI Part III factual findings.

We have not made any changes in response to objections or arguments presented in answers and petitions to intervene by Brooks, GWI and JavaNet that were directed to Part IV of the NOI (the proposed factual and legal conclusions.) We have not reviewed those arguments. The NOI required parties and proposed intervenors only to state objections and to provide offers of proof with respect to the proposed factual findings in Part III of the NOI. It stated also that the Part IV factual and legal conclusions would most likely be addressed in briefs and, if necessary, oral argument. Thus, the parties that provided arguments concerning Part IV conclusions did so gratuitously; other parties did not address those conclusions. As described in Part V of this Order, all parties will be provided an opportunity to address issues related to the proposed factual and legal conclusions, contained in Part IV of the NOI as modified herein.

We make changes to the following numbered paragraphs of the proposed factual and legal conclusions contained in Part IV of the NOI:

A. Footnote at the end of paragraph 3

Footnote: Similarly, for interstate (or intrastate ~~intra~~interLATA) purposes, an IXC needs to obtain a presubscription agreement with the local carrier(s) or a CIC code, but does not need CO codes.

The change fixes an error in the original. The number of the footnote in the NOI was 5.

B. Paragraph 4

4. No calls placed to the 52 non-Portland Brooks codes terminate in the locations to which those CO codes are assigned. ~~Most or all~~ All of the calls placed to the 52 non-Portland codes terminate at premises of Brooks's customers that are within the Brooks Portland area exchange. ~~Some of the calls placed to the 52 non-Portland codes may terminate at premises located outside of the Brooks Portland area exchange, but only if Brooks customers have arranged for the calls to be transported to those other locations by private line or similar facilities.~~

We make the above changes to paragraph 4 because Brooks has stated that no calls to its non-Portland CO codes presently terminate outside the Brooks Portland area exchange. The changes parallel the changes to the factual findings in NOI, Part III, ¶¶ 7 and 10. See discussion in this Order at Part II(C) and (F).

C. Paragraph 5

5. Brooks is not using the 52 non-Portland area codes to provide local service in the locations to which the codes have been assigned. Instead, Brooks has requested and is using the 52 non-Portland CO codes to gather traffic throughout *areas of the state that are outside Brooks's Portland exchange (and outside the BSCA of Bell Atlantic's Portland exchange)*, to bring that traffic to its switch located in its Portland area exchange, and ~~then~~ to route that traffic to customers located in the Portland area exchange. Brooks is using the codes so that end-users may obtain toll-free service between each of the locations at which the 52 codes are assigned and the Brooks Portland area exchange, and so that Brooks's customers (e.g., ISPs and voice mail providers) may gather traffic on a toll-free basis. In areas served by those ILECs (Bell Atlantic and 7 ITCs) that have permitted calls to the

Brooks non-Portland area CO codes to be completed, Brooks is providing the equivalent of 800 or foreign exchange service to end users and its customers, ~~but~~. *Brooks itself characterizes the service as equivalent to foreign exchange service. It claims, however, that foreign exchange service is local because an end-user in a non-Portland area may dial a "local" Brooks CO code (one assigned to the same exchange or within the same BSCA in which the end-user placing the call is located), and the caller is not charged a toll charge for the call. The service Brooks is providing is equivalent to foreign exchange service (at least for inward calling, i.e., calls originating outside the Brooks Portland area exchange and terminating in Portland) in all material respects. Brooks is incorrect, however, that the service is a local, rather than an interexchange, service. By definition, foreign exchange service allows an end-user located in the "foreign" exchange (e.g., Augusta) to dial a number that is located within the caller's BSCA and be connected to the subscriber of the foreign exchange service, who is located in a different exchange, normally one that is outside the caller's BSCA, e.g., an FX subscriber in Portland. In the absence of the foreign exchange service, the end user placing the call would be billed toll charges if the call terminated outside the caller's BSCA. Chapter 280, § 2(G) defines traffic between exchanges as "interexchange traffic", unless it is between points having "local calling" with each other.¹⁰ Under Chapter 280, §§ 2(A) and 8, interexchange service provided by a carrier is subject to interexchange access charges. Accordingly, the Brooks foreign exchange-like service described in this paragraph is interexchange service, and the traffic that originates in areas to which Brooks's non-Portland area CO codes are assigned and that terminates in Brooks's Portland area exchange is interexchange traffic. ~~Brooks, Brooks's customers and end users are not paying for the costs incurred by the ILECs for providing interexchange service.~~ End-users who are located in the local calling areas to which Brooks's non-Portland area codes are assigned place calls to those non-Portland codes, and the ILECs transport that*

¹⁰Section 2(G) includes "extended area service" as part of local calling. We interpret that provision to include calling within a BSCA as "local."

traffic over their *interexchange* facilities at their cost to Brooks's Portland area exchange. *Brooks, Brooks's customers and end users who place calls using the Brooks non-Portland CO codes are not paying for the costs incurred by the ILECs for providing that interexchange service.*

The changes to the proposed factual and legal conclusions in paragraph 5 are not intended to change any tentative conclusion we proposed in the NOI, but to provide further elaboration of those conclusions. They are intended to address arguments that Brooks has directed to certain findings proposed in Part III of the NOI. The major portion of the new material addresses Brooks's claim that the service in question is foreign exchange (FX) in nature and that such FX service constitutes local service.

D. New Paragraph 6

The legal conclusion that the traffic described in paragraph 4 and 5 is interexchange, not local, is based on the definitions of "interexchange traffic" and "interexchange service" contained in Chapter 280 § 2(G) of the Commission's rules. Those definitions are fully consistent with the definitions of "interexchange" and "local" contained in the interconnection agreement between Brooks and Bell Atlantic, approved by the Commission in Docket No. 97-052. Accordingly, the interconnection agreement also defines the traffic described in paragraphs 4 and 5 of NOI, Part IV as "interexchange." The agreement applies interconnection charges only to local traffic and applies each carrier's access tariff to interexchange traffic. There is nothing else in the agreement that contradicts the conclusion that the described traffic is interexchange or that it should not be subject to access charges.

We add a new paragraph 6 to the proposed factual and legal conclusions. We do so because of arguments that Brooks directed to certain factual findings in Part III. Brooks argues that the Brooks-BA interconnection agreement "requires" BA to pay interconnection charges for the traffic that originates in locations to which Brooks's 52 non-Portland CO codes are assigned and that terminates in Brooks's Portland area exchange. Our review of the relevant definitions in the agreement and in Chapter 280, and of the remainder of the agreement, indicates

that the agreement requires exactly the opposite: that the traffic is interexchange and is subject to the interexchange access charges in BA's and Brooks's access tariffs.

We note that Brooks's own tariff is consistent with the interexchange and local service definitions contained in Chapter 280 and in the interconnection agreement. Brooks's tariff (§ 1.6) defines "local calling" as "a completed call . . . between a calling Station and any other Station within the local service area of the calling Station." The "local service area" is the Brooks "Portland area exchange," as defined in Brooks's tariff, §§ 1.4, 1.4-A and 4.2.1, and in Part III, paragraph 3 of the NOI.

Brooks's argument (directed to NOI, Part III.A.13) quoted the definitions of "rate center" and "routing point" in the agreement (§§ 1.53 and 1.56) in support of its argument. We fail to see how these provisions contradict the conclusions we have proposed or how these definitions are otherwise relevant to the question of whether the traffic at issue in this case is local or interexchange.

NOTE: Original paragraphs 6, 7, 8 and 9 are renumbered as 7, 8, 9 and 10. We propose no changes to renumbered paragraphs 8 and 10.

E. Paragraph 7 (former no. 6)

~~6.7. On the basis of the findings herein that the traffic to Brooks's 52 non-Portland area CO codes terminate in Brooks's Portland area exchange and not in the locations to which the codes have been assigned,~~
Based on the legal conclusions in paragraph 5 that traffic described in paragraph 4 and 5 is interexchange traffic, ILECs and other CLECs would be justified in ~~determining that the traffic terminates in Brooks's Portland area exchange and in~~ rating it accordingly, i.e., applying toll charges if the Brooks Portland area exchange is outside the local calling area of any exchange of the ILEC or other CLEC.

We make changes to paragraph 7 (formerly no. 6) to simplify its original forms by cross-referencing to prior paragraphs. We also clarify the distinction between factual findings and legal conclusions.

F. Paragraph 9 (former no. 8)

8.9. The use of CO codes by Brooks to avoid toll charges creates a serious risk of erosion of the distinction between local calling (home exchange plus exchanges that are within a BSCA) and toll calling that is embodied in the ILECs' terms and conditions and in regulatory policy (e.g., Chapter 204, the Basic Service Calling Areas (BSCA)). Any such breakdown or erosion should occur only pursuant to an intentional policy choice rather than because of the misuse of CO codes. A breakdown of the toll-local distinction, with "free" calling to areas that formerly required toll charges, may have several significant consequences. First, carriers' ability to maintain calling areas that require toll charges might be substantially diminished, with the result that more (or even all) costs would have to be loaded onto rates for basic service, which therefore may need to increase substantially. In addition to rate effects, a breakdown of the toll/local distinction might also have a substantial impact on traffic patterns and levels, on service quality (because of temporary shortage of facilities) and the need to invest in additional transport and switching facilities. The distinction between local and toll in Bell Atlantic's and the ITCs' tariffs reflects existing traffic volumes and investment patterns.

The existence of foreign exchange (FX) service does not by itself cause the risks and concerns described above if the pricing for the use of the facilities that are utilized in that service, and to subscribers of the service, properly reflects the interexchange nature of the service. Thus, to avoid the risks described above, carriers providing the transport facilities that carry the traffic of the carrier offering the FX service should charge prices for the use of those facilities that reflect the interexchange nature of the ultimate service that is offered; if so priced, it is likely the price to subscribers to the FX services would also reflect the interexchange nature of the service. At present, Brooks is not paying BA anything for the use of BA's trunking facilities that carry traffic originating in the areas of Brooks's non-Portland codes to Brooks's switch in Portland. Indeed, BA pays Brooks local interconnection charges (as part of reciprocal compensation) for the termination of that traffic on Brooks's local facilities.

We provide additional material at the end of the renumbered paragraph 9 (former paragraph 8). The new material addresses the

fact that the service offered by Brooks is foreign exchange in nature, and the implications that flow from improper and proper pricing of the underlying facilities for that service.

Appendix B contains the complete proposed factual and legal conclusions as revised by this Order.

V. FURTHER PROCEEDINGS

Parties shall address the proposed Factual and Legal conclusions (NOI, Part IV, as modified by Part IV of this Order) through briefing and oral argument. The Factual and Legal conclusions are based on legal principles and on current and proposed policies, as well as the factual findings of NOI, Part III, as modified by Part III of this Order. Part IV restates many of the facts found in NOI, Part III; some of the factual conclusions may be based on inferences drawn from the Part III facts.

Briefs addressing the Proposed Factual and Legal Conclusions (NOI, Part IV, as modified by Part III of this Order) shall be filed on or before **December 22, 1998**. We will hold a **public hearing on Wednesday, January 13, 1999 at 9:00 a.m. in the Commission's Hearing Room** to allow parties to present further oral arguments and other views on all aspects of this case. We will also offer an opportunity to present written argument concerning what orders (NOI, Part V), if any, we should enter.

Dated at Augusta, Maine this 2nd day of December, 1998.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

APPENDIX A

FACTUAL FINDINGS (PART III)

1. New England Fiber Communications L.L.C. d/b/a Brooks Fiber Communications (Brooks) is a competitive local exchange carrier (CLEC) as defined by Maine and Federal law. See Chapter 280, §§ 2(C),(D) and (J); 47 U.S.C. §§ 153(26) and 251(H). The Commission granted Brooks the authority to provide local exchange service in the State of Maine in an Order issued in Docket No. 97-331 on July 25, 1997, and interexchange service in an Order issued on September 9, 1997 in Docket No. 97-559.

2. Brooks owns and maintains a switch in the City of Portland. Bell Atlantic and Brooks own and maintain trunking between Brooks's switch and BA's tandem switch in Portland, which switches both local and interexchange traffic.

3. Brooks's terms and conditions on file with the Commission define its service area as follows: "Where facilities are available, the Company's service area consists of the local exchange as described in Attachment A." Attachment A is a map that depicts the areas included within the municipal boundaries of Portland, South Portland and Westbrook. This Notice will refer to that exchange as "Brooks Portland area exchange" or the "Brooks exchange."¹¹

4. Brooks has applied for and has obtained 55 CO codes (NXXs) from the North American Numbering Plan Administrator (NANPA). At the time it obtained the codes the NANPA was Bell Atlantic; Lockheed Martin took over this function in late October of 1998. The 55 codes are assigned to various geographic locations throughout the State. Only 3 of the CO codes are assigned to locations within the Brooks Portland area exchange. Those three codes are Portland 228, South Portland 239 and Westbrook 464.

5. Brooks designated and the NANPA assigned the other 52 CO codes to locations outside the Brooks exchange and outside the Portland calling area as defined by the ILECs' terms and conditions. This Notice will refer to these 52 codes as the "non-Portland CO codes."

¹¹The Brooks exchange lies entirely within Bell Atlantic's Portland calling area (areas/exchanges that are included in the BSCAs of BA-ME's Portland, South Portland and Westbrook exchanges), as defined by the Bell Atlantic's terms and conditions, Part A, § 6. Bell Atlantic's Portland exchange includes the municipalities of Portland and South Portland, as well as Falmouth and Cape Elizabeth. Its BSCA consists of the exchange itself plus Cumberland, Freeport, Gorham, Pownal, Scarborough, Westbrook, Windham, Yarmouth, Gray and West Gray. The Westbrook exchange includes the City of Westbrook. Its BSCA includes Portland, Gorham, Windham and Scarborough.

APPENDIX A

FACTUAL FINDINGS (PART III)

6. Brooks does not own, lease or maintain any facilities (switches or loops) in any of the locations at which the 52 non-Portland area CO codes are assigned.¹² A potential subscriber located in one of the non-Portland CO code locations is not able to obtain a loop, local switching or local dial tone from Brooks at that location. For Brooks to offer loops, local switching and local dial tone in one of the non-Portland CO code areas (for example, in Augusta), using its Portland switch for switching, Brooks would need to obtain a dedicated facility (a loop and an interoffice facility) from the customer's premises in Augusta to Brooks's switch in Portland. Alternatively, it could place a switch in Augusta and build (or buy) a loop from that switch to the customer in Augusta.

7. Brooks does not provide loops, local switching and local dial tone in any of the non-Portland locations, or purchase local exchange service for resale from another local exchange carrier, or provide any other method for a call to be terminated in those locations. Therefore, a person placing a call to one of those codes cannot be connected to a Brooks customer that has a customer premises¹³ in the location to which the code is assigned. Instead, the call will be routed to (or terminate at) a Brooks customer that is located in the Brooks Portland area exchange, and that is connected by a loop or other transport facility provided by Brooks (or by the customer) to Brooks's Portland switch. Thus, if a person calls a number in Brooks's 835 code (assigned to Augusta), the person will be connected to a Brooks customer located in Brooks's Portland area exchange, and not to a Brooks customer located in Augusta.

If, for example, a BA customer in Augusta calls a number with an 835 CO code (the Brooks code that is assigned to Augusta), the call will be routed as follows:

- ♦ from the BA customer's premises in Augusta over the BA loop facilities assigned to that customer to the local BA Augusta switch;
- ♦ then over BA's trunking (transport) facilities dedicated to Brooks's traffic directly to Brooks's switch in Portland or, in the case of

¹²Brooks also does not purchase local service for resale purposes from BA so that it would be able to provide local service to any of those locations. If a CLEC did provide local service through resale, it would not acquire its own CO code.

¹³A customer premises is a place, normally a building, at which an access line may terminate.

APPENDIX A

FACTUAL FINDINGS (PART III)

overflow traffic, over BA non-dedicated trunking facilities to BA's tandem in Portland, and then over the trunks owned by Brooks that run from BA's tandem to Brooks's switch;

- ♦ then to a Brooks's customer having premises in the Brooks's Portland area exchange over a Brooks loop or other transport facility assigned to that customer.

8. If, for example, a caller in Hampden (served by an independent telephone company (ITC)) places a call to an 849 number (the Brooks code assigned to Bangor), the call is routed over trunks owned and maintained by the ITC from Hampden to the meet point between the ITC and BA, then over BA trunks to Brooks's switch in Portland, (or, for overflow traffic, to the BA tandem in Portland, then to Brooks's switch), then to a Brooks customer in its Portland area exchange. It is not necessary for the call to be routed to or through Bangor on the way to Portland, although Hampden Telephone Company's and BA-ME's trunking could be configured to route it, unswitched, through Bangor. The call will be switched at the Hampden switch of Hampden Telephone Company, but it will not be switched at BA-ME's Bangor switch.

9. Under both of the scenarios described in Paragraphs 7 and 8 above, the call cannot be routed from Brooks's switch to a Brooks customer either in Augusta or in Bangor; there are no loop facilities from Brooks's switch in Portland or facilities that are configured in such a way as to act as loops to carry the call to a Brooks customer who is located in Augusta or Bangor.

10. None of the incumbent local exchange carriers (ILEC) exchanges that are located in the places to which the 52 Brooks non-Portland CO codes have been assigned include the Brooks Portland area exchange within their basic service calling areas (BSCAs), as established in their terms and conditions pursuant to the BSCA rule, Ch. 204.

11. Some of Brooks's customers are Internet service providers (ISPs). At least one customer provides voice-mail services. Those companies desire to route traffic from throughout the state to a single location or facility, such as an Internet server. Brooks has assigned 7-digit telephone numbers from the non-Portland CO codes to many of those companies. Brooks and/or these companies have caused these numbers to be published, and Brooks and/or its customers have represented to their own customers that charges for the calls will be based on the location to which the CO code was designated by Brooks. For example, CO code 835 is assigned to Augusta, and customers of

APPENDIX A

FACTUAL FINDINGS (PART III)

ISPs have been told that a call to an 835 CO code would be considered as a call to Augusta. In addition, some recent Bell Atlantic telephone directories (e.g., Portland Area, published in August 1998) have listed the 55 CO codes assigned to Brooks as located in the places (e.g., 835-Augusta) at which Brooks designated them. Thus, a Bell Atlantic customer in the Augusta exchange (or within the Augusta BSCA) who dials an 835 number (e.g., in order to connect to an ISP located in Portland), would reasonably expect that the call would be a non-toll call.

12. Bell Atlantic considers calls to the non-Portland CO codes to be calls to the locations specified by the Brooks assignments on file with the NANPA and rates them accordingly. Thus, Bell Atlantic rates a call to 835 (assigned to Augusta) as terminating in Augusta, even though it actually terminates at a Brooks customer who is located in the Brooks Portland Area exchange. If a Bell Atlantic customer in Augusta calls an 835 number, there is no toll charge; the call is considered local. Similarly, if a Bell Atlantic customer in Readfield (whose BSCA includes Augusta) calls an 835 number, Bell Atlantic considers the call to be local and no toll is charged. For purposes of the interconnection agreement with Brooks, Bell Atlantic also considers the call as terminating at the location assigned to the code by Brooks and the NANPA (e.g. 835 - Augusta). Thus, for a call from Augusta or Readfield to an 835 number, Bell Atlantic pays a "reciprocal compensation" to Brooks for "interconnection pursuant to section 251(c)(2)," as provided in the interconnection agreement approved by the Commission pursuant to 47 U.S.C. § 252 on August 26, 1997, in Docket No. 97-502, even though BA transports the traffic from Augusta to Portland over its trunking facilities. Under the agreement, BA-ME and Brooks pay each other "reciprocal compensation" of \$.008 per minute for "Local Traffic." "Local Traffic" is defined in the agreement as traffic in the local areas included in BA-ME's terms and conditions, Part A, § 6, i.e., the local exchange plus exchanges that are included in that exchange's BSCA. The agreement also makes clear that the companies' respective access tariffs apply to all switched "Exchange Access" services¹⁴ and to intraLATA toll traffic (i.e., to interexchange traffic). The agreement defines "intraLATA traffic" as all traffic that is not local. That definition is substantively identical to the definition of

¹⁴The agreement defines "exchange access" as that term is used in the Telecommunications Act. 47 U.S.C. § 153(16) states:

(16) EXCHANGE ACCESS.-The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

APPENDIX A

FACTUAL FINDINGS (PART III)

"interexchange communications or traffic" contained in Chapter 280, § 2(G) of the Commission's rules.

13. The independent telephone companies have treated this traffic in different ways. The majority of ITCs have not "opened up" the Brooks CO codes that are assigned to locations within their local (BSCAs), i.e., if one of their customers attempts to make a call to one of those codes, it is not completed. For example, Augusta is included in the BSCA of Winthrop, served by Community Service Telephone Company (CST). If a CST customer in Winthrop attempts to call an 835 number (the Brooks code assigned to Augusta), CST blocks the call.

Some ITCs (the six TDS companies, Pine Tree Telephone and Telegraph Company and Mid-Maine) have "opened up" the Brooks CO codes that are assigned to places within the local calling areas of those ITCs' exchanges, and rate the calls as local. Thus, those companies are rating the traffic in the same manner as Bell Atlantic.

At present, no ITC has "opened up" Brooks codes that are assigned to locations within the ITC's local calling area (EAS or BSCA) and also rated the calls to those exchanges as toll.

All of the ITCs have opened up the Brooks CO codes that are assigned to locations that are outside the ITCs' local calling area (BSCA). A call placed to a BA or ITC code at those locations is a toll call, and the ITCs also bill the call to the Brooks CO code in those same locations as toll.

One ITC, Pine Tree Telephone and Telegraph Company, has recently informed the Commission that it considers Brooks to be an interexchange carrier and that it will charge Brooks access charges for any traffic that originates in its service territory.

14. The NANPA has projected that Maine will need another area code by the second quarter of 2000 and has requested this Commission to present a plan for a second area code by December 1, 1998. Approximately 792 CO codes are available in an area code. Of the 792 CO codes in area code 207, 518 (including the 55 Brooks CO codes) have been assigned. Within the 518 assigned codes (many to exchanges with a small number of customers), there is a large number of unused telephone numbers. Those unused numbers are not presently available for use by another LEC, however, because the telephone numbers within a CO code (NXX) cannot presently be apportioned among LECs; each LEC providing local exchange service in an area currently must have its own CO code. A solution (local number portability) that allows several

APPENDIX A

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LECs to share numbers in the same CO code in the same area is not likely to be available for another one or two years.

APPENDIX B

Revised Proposed Factual and Legal Conclusions (Part IV)

1. Brooks provides local exchange telephone service only in the Brooks Portland area exchange (CO codes 228, 239 and 464), consisting of areas within the municipal boundaries of Portland, South Portland and Westbrook.

2. Brooks does not provide local exchange service in any other location in the State of Maine, including the locations at which Brooks and the NANPA have assigned its 52 other CO codes (the non-Portland codes). Brooks does not have the present ability to furnish potential local exchange customers in those locations with loops, switching and other facilities that are necessary to provide local exchange service. Brooks also does not have the legal authority to provide local exchange service in those locations because its terms and conditions on file with the Commission limit its local exchange service offering to its Portland area exchange.

3. The purpose of a CO code (NXX) is to allow a carrier to provide local service, i.e., the ability of local customers to make and receive local calls. While those codes are also used for making and receiving interexchange calls (using the LEC or a different carrier), it is not necessary for a carrier providing only interexchange (long distance) service to obtain CO codes. A customer placing a long distance call uses a local carrier to connect to the long distance carrier, either by intraLATA presubscription (1+ dialing) or by the use of a CIC code (101XXXX).¹⁵

4. No calls placed to the 52 non-Portland Brooks codes terminate in the locations to which those CO codes are assigned. All of the calls placed to the 52 non-Portland codes terminate at premises of Brooks's customers that are within the Brooks Portland area exchange.

5. Brooks is not using the 52 non-Portland area codes to provide local service in the locations to which the codes have been assigned. Instead, Brooks has requested and is using the 52 non-Portland CO codes to gather traffic throughout areas of the state that are outside Brooks's Portland exchange (and outside the BSCA of Bell Atlantic's Portland exchange), to bring that traffic to its switch located in its Portland area exchange, and to route that traffic to customers located in the Portland area exchange. Brooks is using the codes so that end-users may obtain toll-free service between each of the locations at which the 52 codes are assigned and the Brooks Portland area exchange, and so that Brooks's customers (e.g., ISPs and voice mail providers) may gather traffic on a toll-free basis. In areas served by those

¹⁵Similarly, for interstate (or intrastate interLATA) purposes, an IXC needs to obtain a presubscription agreement with the local carrier(s) or a CIC code, but does not need CO codes.

APPENDIX B

Revised Proposed Factual and Legal Conclusions (Part IV)

ILECs (Bell Atlantic and 7 ITCs) that have permitted calls to the Brooks non-Portland area CO codes to be completed, Brooks is providing the equivalent of 800 or foreign exchange service to end users and its customers. Brooks itself characterizes the service as equivalent to foreign exchange service. It claims, however, that foreign exchange service is local because an end-user in a non-Portland area may dial a "local" Brooks CO code (one assigned to the same exchange or within the same BSCA in which the end-user placing the call is located), and the caller is not charged a toll charge for the call. The service Brooks is providing is equivalent to foreign exchange service (at least for inward calling, i.e., calls originating outside the Brooks Portland area exchange and terminating in Portland) in all material respects. Brooks is incorrect, however, that the service is a local, rather than an interexchange, service. By definition, foreign exchange service allows an end-user located in the "foreign" exchange (e.g., Augusta) to dial a number that is located within the caller's BSCA and be connected to the subscriber of the foreign exchange service, who is located in a different exchange, normally one that is outside the caller's BSCA, e.g., an FX subscriber in Portland. In the absence of the foreign exchange service, the end user placing the call would be billed toll charges if the call terminated outside the caller's BSCA. Chapter 280, § 2(G) defines traffic between exchanges as "interexchange traffic", unless it is between points having "local calling" with each other.¹⁶ Under Chapter 280, §§ 2(A) and 8, interexchange service provided by a carrier is subject to interexchange access charges. Accordingly, the Brooks foreign exchange-like service described in this paragraph is interexchange service, and the traffic that originates in areas to which Brooks's non-Portland area CO codes are assigned and that terminates in Brooks's Portland area exchange is interexchange traffic. End-users who are located in the local calling areas to which Brooks's non-Portland area codes are assigned place calls to those non-Portland codes, and the ILECs transport that traffic over their interexchange facilities at their cost to Brooks's Portland area exchange. Brooks, Brooks's customers and end users who place calls using the Brooks non-Portland CO codes are not paying for the costs incurred by the ILECs for providing that interexchange service.

6. The legal conclusion that the traffic described in paragraph 4 and 5 is interexchange, not local, is based on the definitions of "interexchange traffic" and "interexchange service" contained in Chapter 280 § 2(G) of the Commission's rules. Those definitions are fully consistent with the definitions of "interexchange" and "local" contained in the

¹⁶Section 2(G) includes "extended area service" as part of local calling. We interpret that provision to include calling within a BSCA as "local."

APPENDIX B

Revised Proposed Factual and Legal Conclusions (Part IV)

interconnection agreement between Brooks and Bell Atlantic, approved by the Commission in Docket No. 97-052. Accordingly, the interconnection agreement also defines the traffic described in paragraphs 4 and 5 of NOI, Part IV as "interexchange." The agreement applies interconnection charges only to local traffic and applies each carrier's access tariff to interexchange traffic. There is nothing else in the agreement that contradicts the conclusion that the described traffic is interexchange or that it should not be subject to access charges.

7. Based on the legal conclusions in paragraph 5 that traffic described in paragraph 4 and 5 is interexchange traffic, ILECs and other CLECs would be justified in rating it accordingly, i.e., applying toll charges if the Brooks Portland area exchange is outside the local calling area of any exchange of the ILEC or other CLEC.

8. The use of CO codes, whether by Brooks or by other CLECs or ILECs, for the purpose of allowing customers to avoid toll charges, rather than for the purpose of providing local exchange service, presents a serious risk that CO codes, which are a limited resource within any given area code, will be exhausted and that will be necessary to implement a second area code for the State of Maine. In Docket No. 98-634, the Commission has commenced an investigation into the matter of code exhaust and the need to conserve codes. The Commission finds the exhaustion of CO codes in the 207 area code is undesirable because it will cause substantial disruption to many customers in Maine by requiring them to change either their area code, their seven-digit telephone number or both, and may require 10-digit dialing for some or all intrastate calls.

9. The use of CO codes by Brooks to avoid toll charges creates a serious risk of erosion of the distinction between local calling (home exchange plus exchanges that are within a BSCA) and toll calling that is embodied in the ILECs' terms and conditions and in regulatory policy (e.g., Chapter 204, the Basic Service Calling Areas (BSCA)). Any such breakdown or erosion should occur only pursuant to an intentional policy choice rather than because of the misuse of CO codes. A breakdown of the toll-local distinction, with "free" calling to areas that formerly required toll charges, may have several significant consequences. First, carriers' ability to maintain calling areas that require toll charges might be substantially diminished, with the result that more (or even all) costs would have to be loaded onto rates for basic service, which therefore may need to increase substantially. In addition to rate effects, a breakdown of the toll/local distinction might also have a substantial impact on traffic patterns and levels, on service quality (because of temporary shortage of facilities) and the need to

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Revised Proposed Factual and Legal Conclusions (Part IV)

invest in additional transport and switching facilities. The distinction between local and toll in Bell Atlantic's and the ITCs' tariffs reflects existing traffic volumes and investment patterns.

The existence of foreign exchange (FX) service does not by itself cause the risks and concerns described above if the pricing for the use of the facilities that are utilized in that service, and to subscribers of the service, properly reflects the interexchange nature of the service. Thus, to avoid the risks described above, carriers providing the transport facilities that carry the traffic of the carrier offering the FX service should charge prices for the use of those facilities that reflect the interexchange nature of the ultimate service that is offered; if so priced, it is likely the price to subscribers to the FX services would also reflect the interexchange nature of the service. At present, Brooks is not paying BA anything for the use of BA's trunking facilities that carry traffic originating in the areas of Brooks's non-Portland codes to Brooks's switch in Portland. Indeed, BA pays Brooks local interconnection charges (as part of reciprocal compensation) for the termination of that traffic on Brooks's local facilities.

10. The use of the 52 non-Portland area CO codes by Brooks for the gathering of toll traffic and avoidance of toll charges, rather than for providing local exchange service, is wasteful of scarce resources, creates a substantial risk that the harms described in paragraphs 7 and 8 above will occur, and constitutes an unreasonable act or practice within the meaning of 35-A M.R.S.A. § 1306.